No. 76-1631

In the Supreme Court of the United States

OCTOBER TERM, 1977

SEYMOUR ROSENWASSER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

JEROME M. FEIT,
ELLIOTT SCHULDER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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CITATIONS

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OPINIONS BELOW

The majority and dissenting opinions of the court of appeals (Pet. App. A-1 to A-18) are reported at 550 F. 2d 806.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 1977. A petition for rehearing with a suggestion for rehearing *en banc* was denied on April 22, 1977 (Pet. App. A-19 to A-20). The petition for a writ of certiorari was filed on May 23, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Confrontation Clause requires reversal of petitioner's conviction because the district court permitted

a government witness to testify, over petitioner's objection, regarding a similar offense by his co-defendant, denied petitioner's request for cross-examination, but instructed the jury that it was not to consider this evidence against petitioner.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted, together with co-defendant Gerald Allicino, of unlawful possession of goods stolen from interstate commerce, in violation of 18 U.S.C. 659. The jury acquitted petitioner of conspiracy to possess stolen goods, in violation of 18 U.S.C. 371, although it convicted Allicino of that charge. Petitioner was sentenced to two years' imprisonment and a $5,000 fine. The court of appeals affirmed, one judge dissenting (Pet. App. A-1 to A-18).[1]

Through the testimony of Paul Fleischer, a convicted felon and self-confessed truck hijacker (Tr. 35-49, 129-154, 158-159),[2] the government established that, on March 3, 1972, Fleischer and several confederates hijacked an Arlene Knitwear Company truck that was carrying a shipment of women's garments (Tr. 60-66). Later that day the hijackers met with co-defendant Allicino, who agreed to purchase the entire load after viewing samples of the stolen garments and copies of the shipping documents (Tr. 83-87). Arrangements were made for the delivery of the shipment to Allicino on March 6, 1972, at 2395 Pacific Street, in Brooklyn, New York (Tr. 87-88).

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[1]Allicino's appeal was voluntarily withdrawn in the court of appeals (Pet. App. A-2 n. 1).

[2]"Tr." refers to the transcript of the proceedings before the district court.

On March 6, 1972, the hijackers transported the stolen merchandise to the Pacific Street address. They were met there by Allicino, who helped unload the goods and directed that they be brought to petitioner's first floor garment factory on a freight elevator that was operated by Allicino's brother (Tr. 95-98). Allicino introduced petitioner to the others as his "partner" (Tr. 99). At first petitioner protested that he did not want the goods, and an argument ensued between petitioner and one of the hijackers, but petitioner and Allicino finally agreed to purchase one-third of the shipment and to keep the remainder at the factory until the hijackers could locate another buyer (Tr. 101-102). Petitioner and Allicino agreed to pay $2,300 for their share, and Allicino delivered the money to the hijackers that evening (Tr. 104-110). The next day the hijackers returned to petitioner's factory, picked up the remaining merchandise, and delivered it to Solomon Broverman (Tr. 118-124).[3]

As part of its direct case the government called F.B.I. Agent Ernest Haridopolos, who testified—over petitioner's objection—that some three weeks after the garment hijacking he arrested Allicino for committing a similar act, possession of a stolen interstate shipment of liquor. Haridopolos had observed Allicino unloading the stolen liquor at the street level doorway of the building at 2395 Pacific Street where Allicino's brother was the elevator operator (Tr. 307-317). Although Agent Haridopolos did not mention petitioner in his testimony, other evidence at trial (including petitioner's testimony) established that this was the same building in which petitioner's firm rented space.

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[3]When Fleisher led F.B.I. agents to Broverman's residence they discovered seven boxes of stolen merchandise (Tr. 295-296).

On three separate occasions the trial court cautioned the jury that Agent Haridopolos' testimony was admissible only against Allicino, and was to be considered solely on the question of Allicino's knowledge and intent to commit the crime charged (Pet. App. A-3 to A-5 nn. 2, 3).[4] Petitioner sought to cross-examine Haridopolos concerning Allicino's possession of the stolen liquor in order to dispel any "spillover" as to petitioner. The prosecutor objected on the ground that the agent's testimony had not been introduced against petitioner. The court ruled that since the evidence was not admitted against petitioner (and since this limitation as to its admissibility had been made clear to the jury) petitioner could not cross-examine Haridopolos. The court added, however, that petitioner was free to call Haridopolos as his own witness, whereupon the prosecutor indicated that if petitioner questioned Haridopolos (either as his own witness or on cross-examination) he would thereby "open the door" to further inquiry concerning petitioner's involvement with the stolen liquor. Petitioner then declined to examine Haridopolos (Tr. 319-321).

Petitioner testified on his own behalf and denied any involvement in the crimes charged (Tr. 401-404). He conceded that he operated a women's garment manufacturing business in a first floor factory loft at the Pacific Street building, but he testified that the building was also occupied by other commercial tenants. Petitioner

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[4]These cautionary instructions were given: (1) following the prosecutor's reference to the evidence in his opening statement (Tr. 19-20); (2) prior to Agent Haridopolos' testimony (Tr. 310); and (3) in the court's final charge before submitting the case to the jury (Tr. 618-620). In addition, the jury was instructed that the guilt of each defendant must be determined separately and only on the basis of the evidence (or lack of evidence) against him (Tr. 593).

denied any knowledge of the stolen liquor that had been stored in that building during March of 1972 (Tr. 416-419). He admitted his long friendship with Allicino, who resided on Pacific Street across from the building that housed petitioner's factory (Tr. 404-406).

ARGUMENT

Petitioner contends (Pet. 6-8) that the similar offense evidence of Allicino's subsequent possession of stolen liquor was in fact used against petitioner, and that it was therefore reversible error for the trial judge to prevent his cross-examination of Agent Haridopolos concerning that episode. Although, as the majority below observed, petitioner's argument is "not without merit" (Pet. App. A-5), the court of appeals correctly concluded that the district court committed no reversible error in the particular circumstances of this case.

The trial judge properly exercised his discretion in admitting, as to Allicino, the proof of his subsequent criminal act, because it was relevant to his intent to participate in the conspiracy charged, as well as to his knowledge that the goods he received were stolen. See *United States* v. *Leonard*, 524 F. 2d 1076, 1091 (C.A. 2), certiorari denied, 425 U.S. 958; *United States* v. *Brettholz*, 485 F. 2d 483, 487-488 (C.A. 2), certiorari denied, 415 U.S. 976; Fed. R. Evid. 404(b). Petitioner does not dispute that the trial judge instructed the jury on three separate occasions that this evidence was to be considered only against Allicino, and only for this limited purpose (Pet. App. A-3 to A-5 nn. 2, 3).

He maintains, however, that although he had nothing to do with the stolen liquor transaction, Agent Haridopolos' testimony suggested his involvement, because the liquor was being unloaded at the building in which petitioner had his factory. Accordingly, he contends that this

evidence was introduced against him as well as against Allicino. Petitioner urges that in this case, as in *United States* v. *Bruton*, 391 U.S. 123, a cautionary instruction was not adequate to ensure that the jury would consider this evidence solely against petitioner's co-defendant.

This is a somewhat more difficult case than one in which one defendant's similar act has no logical connection with his co-defendant, and thus its admission could not possibly prejudice this co-defendant. Yet, here, unlike *Bruton*, it is far from clear that "the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." 391 U.S. at 135. This Court also recognized in *Bruton* that in "many circumstances * * * reliance [on limiting instructions] is justified" (*ibid.*), and in most circumstances a reviewing court must presume that the jury followed its instructions. See *Shotwell Manufacturing Co.* v. *United States*, 371 U.S. 341, 366-367; *Opper* v. *United States*, 348 U.S. 84, 95; *United States* v. *Davis*, 546 F. 2d 617, 620-621 (C.A. 5); *United States* v. *Pauldino*, 443 F. 2d 1108 (C.A. 10), certiorari denied, 404 U.S. 882; *United States* v. *Frazier*, 394 F. 2d 258 (C.A. 4), certiorari denied, 393 U.S. 984.

In *Bruton*, the evidence in question was testimony regarding an oral confession by Bruton's co-defendant, in which he had admitted that both he *and Bruton* had committed the crime for which they were being tried. The Court characterized this testimony as so "powerfully incriminating" and "devastating" to Bruton, while at the same time so "inevitably suspect" as the testimony of a co-defendant, that a limiting instruction could not be presumed to be effective. 391 U.S. at 135-136.

Here, in contrast, the evidence was a far cry from the powerfully incriminating statement of a co-defendant admitting that petitioner had committed the very act for which he was being tried. Instead, it was only evidence that several weeks after the offense charged co-defendant Allicino unloaded a shipment of another kind of stolen goods at the building in which Allicino's brother worked—which was, as shown by other evidence, the building in which petitioner was a commercial tenant. As the court of appeals correctly concluded (Pet. App. A-6; footnotes omitted):

> Under the circumstances of this case, these limiting instructions were sufficiently strong to preclude the jury from utilizing the agent's testimony to convict Rosenwasser. Thus, it is especially significant that the jury knew that Allicino had access to the Pacific Street building by virtue of his brother's employment there, and that the stolen whiskey had been recovered from a part of the building not leased by Rosenwasser. With the full factual presentation before it, the jury was capable of considering Haridopolos' testimony exclusively against Allicino. * * *

At most, this evidence might leave the jury, as the dissenting judge in the court of appeals stated, "with the gnawing suspicion that [petitioner] might have had something to do with the similar offense * * *" (Pet. App. A-16). But petitioner was not being tried for any offense in connection with the stolen liquor. And this evidence, which raised merely a "suspicion" in connection with that offense, was certainly not such compelling proof of his guilt in the stolen garment episode—for which he was

being tried—that it raised a presumption that the jury could not or would not follow its instructions.[5]

Moreover, although there was, perhaps, a somewhat greater danger that the jury might disregard the limiting instruction and consider Haridopolos' testimony as probative of petitioner's guilt on the conspiracy charge, the jury acquitted him of conspiracy. The majority below correctly viewed this as a further indication that the jury had followed the trial judge's instructions (Pet. App. A-6 n. 7). See *United States* v. *Kaplan*, 554 F. 2d 958, 967 (C.A. 9); *United States* v. *Partin*, 522 F. 2d 621, 641 (C.A. 5), petition for certiorari pending, No. 77-34; *United States* v. *Strand*, 517 F. 2d 711 (C.A. 5), certiorari denied, 423 U.S. 998; *United States* v. *Baum*, 482 F. 2d 1325 (C.A. 2).

Nor is there any suggestion that the evidence in question is "inevitably suspect" like that in *Bruton*. In contrast to a co-defendant's statement, as to which the Court in *Bruton* observed there is a "recognized motivation to shift the blame onto others" (391 U.S. at 136), the evidence here was an F.B.I. agent's testimony regarding his observation of co-defendant Allicino just before his arrest. Indeed, petitioner does not in any way challenge the reliability of this testimony.

Accordingly, the court of appeals correctly concluded that in the circumstances of this case, the trial court's repeated limiting instructions were "sufficiently strong to

[5]Petitioner emphasizes (Pet. 7-8) the suggestion in a letter his wife received from the Department of Probation that his sentence was justified, in part, by his participation in the stolen liquor episode. We do not agree that any possible confusion on the part of the probation department establishes that the jury, which had the benefit of the court's careful instructions, was similarly confused.

preclude the jury from utilizing the agent's testimony to convict" petitioner (Pet. App. A-6).

2. Since this evidence was not admitted against petitioner, and the district court properly assumed that the jury would follow his instructions on this point, the court's refusal to allow petitioner to cross-examine the agent did not constitute an abuse of discretion. The trial judge necessarily has broad discretion to control the scope of cross-examination. See *Geders* v. *United States*, 425 U.S. 80, 87. Here the evidence was not admitted against and did not incriminate petitioner, and the court's discretionary ruling did not impair either petitioner's right of cross-examination or his right to confront the witnesses against him.[6]

As the court of appeals observed, the jury might well have been confused by petitioner's cross-examination of Haridopolos after it had been instructed that his testimony was not admissible against petitioner (Pet. App. A-7). Indeed, when the district court gave petitioner the opportunity to examine Haridopolos as his own witness, petitioner declined, and the transcript suggests that

[6]In *Bruton*, in contrast, the Court held that the petitioner had not been afforded the right to confront the witnesses against him because he had no opportunity to cross-examine his co-defendant, although the trial court's instructions were not adequate to ensure that the jury would not consider his co-defendant's powerfully incriminating but unreliable confession. The Court held that in those circumstances the limiting instruction was not an adequate substitute for cross-examination: "[t]he effect [was] the same as if there had been no instruction at all." 391 U.S. at 137.

his counsel had decided to "leave the door shut" for tactical reasons.[7]

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[7]The following colloquy occured when the government objected to petitioner's attempt to cross-examine Haridopolos (Tr. 319-321; emphasis added):

> [Assistant United States Attorney]: I am objecting to any cross-examination by the defendant Rosenwasser and ask that the jury be instructed that none of his evidence comes in against him.
>
> * * * * *
>
> Mr. Peluso [petitioner's co-counsel]: *In addition to that language being ambiguous as to the address at 2395 Pacific Street, now the impression can be—*
>
> The Court: *No. It's not admitted against him.*
>
> Mr. Peluso: I think I should make it clear to the jury.
>
> The Court: *I have made it clear to the jury. You can call him as your own witness. You can instruct him to remain and put him on the witness stand, if you wish.*
>
> Mr. Wallach [petitioner's co-counsel]: May we just have a moment, Judge.
>
> The Court: Yes.
>
> (Whereupon, an off-the-record conversation was held.)
>
> The Court: I am assuming, [that the Government is] going to be resting momentarily.
>
> [Assistant United States Attorney]: I will say this, your Honor, that the Government will take the position that if Mr. Peluso cross-examines this witness or, in fact, calls him as his own witness, the door will be opened wide for any inquiry that I might want to make, with respect to any knowledge he may have about anything that the defendant Rosenwasser—
>
> Mr. Wallach: *I guess we will leave the door shut.*
>
> The Court: *It's up to you.*
>
> Mr. Peluso: Judge, am I going to be allowed to examine on those exhibits that were in evidence?
>
> The Court: You will be allowed.
>
> Mr. Peluso: Thank you. I will abide by your Honor's ruling, and I will not examine, subject to your Honor's rule.
>
> (Whereupon, the following took place before the jury.)
>
> Mr. Peluso: In view of your Honor's ruling, I have no further questions of this witness.

In these circumstances the court of appeals correctly concluded that (Pet. App. A-7):

> We simply do not agree that cross-examination, with the attendant confusion, would have been more effective than the limiting instructions in aiding the jury to disregard the stolen liquor evidence as against Rosenwasser. * * * We therefore hold that the district court did not abuse its discretion in denying petitioner the right to cross-examine Haridopolos.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

JEROME M. FEIT,
ELLIOTT SCHULDER,
Attorneys.

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